2013 IL App (1st) 112921-U

SIXTH DIVISION
December 13, 2013

No. 1-11-2921

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 15240
	)	
GENARO SANCHEZ,	)	Honorable
	)	Thomas V. Gainer,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice ROCHFORD and Justice REYES concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Where the record contradicts defendant's claim that trial counsel misinformed him that his suppressed statement would be admissible as substantive evidence if he chose to testify at trial, the plain error doctrine does not apply and defendant's claim of ineffective assistance of counsel fails. The $30 Children's Advocacy Center assessment and the $5 Electronic Citation fee are vacated.

¶ 2 Following a bench trial, defendant Genaro Sanchez was convicted of first degree murder and sentenced to 55 years in prison. On appeal, defendant contends his trial counsel provided ineffective assistance by affirmatively misinforming him that his suppressed statement would be

admissible as substantive evidence if he chose to testify at trial. Defendant further contends that this court should vacate certain fines and fees that were imposed by the trial court.

¶ 3 For the reasons that follow, we affirm defendant's conviction and sentence but order modification of the fines, fees, and costs order.

¶ 4 Defendant's conviction arose from the shooting death of Ernesto Gallarzo on May 13, 2002. Following a jury trial at which defendant testified and asserted self-defense, defendant was convicted of first degree murder and sentenced to 60 years in prison. On appeal, this court reversed and remanded for a new trial, holding that a videotaped statement defendant gave to the police after being arrested should have been suppressed due to a *Miranda* violation. *People v. Sanchez*, No. 1-04-3679 (2006) (unpublished order under Supreme Court Rule 23).

¶ 5 On remand, defendant elected a bench trial.

¶ 6 At the bench trial, Jose Ramos testified through a translator that at about 4:30 a.m. on the date in question, he was sitting in a car in the parking lot of the Vienna Beef Factory Store where he worked when he heard gunshots. Ramos looked out the car window and saw that defendant had shot Gallarzo, who had been holding a cup of coffee and a lunch bag. Gallarzo fell and asked for help, and defendant got in a red van and left the scene. Ramos spoke to the officers who responded to the call. Later that morning, Ramos identified defendant in a lineup. Ramos knew defendant as a former coworker and identified him in court.

¶ 7 Chicago police officer Jesus Sanchez testified that when he and his partner responded to the scene, he saw Gallarzo lying on the ground in the parking lot next to a lunch box and a cup of coffee. Gallarzo told Officer Sanchez that he had been shot. Officer Sanchez testified that he asked Gallarzo several times if he knew who had shot him. Gallarzo indicated that he knew the shooter, but did not provide a name. Officer Sanchez dispatched a description of the shooter and his vehicle over the radio.

¶ 8 Chicago police officer J. Frano testified that shortly after the shooting, he spotted a red minivan being driven by a person fitting the description of the offender. Officer Frano and his partner activated their lights and siren and the minivan accelerated. The officers gave chase. At one point, the minivan's driver slowed to a stop, pulled over slightly, and tossed a firearm out the passenger door before continuing to flee. Officer Frano called dispatch to request that another officer guard the discarded weapon while he kept following the minivan. Eventually, the minivan crashed into a pole. The driver got out with his hands in the air, at which point Officer Frano detained him. In court, Frano identified defendant as the minivan's driver.

¶ 9 Chicago police officer Roy Kawasaki testified that when he processed the scene, he recovered and inventoried a soft-sided "lunch pail type cooler," a fired bullet, and an expended cartridge case from the parking lot area. He also recovered a gun that was being guarded by an officer a few blocks away. Chicago police officer Paul Pater recovered a second cartridge case at the scene of the shooting.

¶ 10 Forensic scientist Kris Rastrelli, an expert in firearms identification, testified that the cartridges and bullet found in the parking lot were fired from the recovered gun. Mary Wong, a forensic scientist, testified that a green jacket defendant was wearing upon arrest tested positive for gunshot residue. Testing of defendant's hands was not conclusive.

¶ 11 The parties stipulated that an autopsy revealed Gallarzo died as the result of two gunshot wounds.

¶ 12 After the State rested, the trial court admonished defendant on his right to testify. Speaking through an interpreter, defendant indicated that he understood that the decision to testify was one that only he could make, that he had consulted with his attorney about whether to testify, and that he had decided of his own free will not to testify. Defense counsel stated, "And just so the court understands, Judge, I have spent hours at the jail with the defendant discussing

this very issue with him, and this is his decision." Defendant rested without presenting any evidence. Following closing arguments, the trial court found defendant guilty of first degree murder and of personally discharging the firearm that caused Gallarzo's death.

¶ 13 Defendant's trial counsel filed a motion for a new trial, but later asked to withdraw as counsel because defendant wanted to allege ineffective assistance. New counsel was appointed. Posttrial counsel filed a motion for a new trial alleging that defendant "was denied due process of law because: 1) his attorney failed to properly advise him of his absolute right to testify at trial; 2) he was unable to communicate with his attorney during portions of the trial and; 3) he was, in effect, impermissibly tried in absentia."

¶ 14 At the hearing on the motion for a new trial, defendant testified through an interpreter that he and trial counsel discussed trial strategy "perhaps" three times. Defendant stated, "I told him that I wanted to testify, but that they should have the other witness that I have also testify." Counsel told defendant it was his decision whether to testify, but did not tell him what the benefits of testifying would be or tell him whether his testimony would help or hurt his case. According to defendant, trial counsel did not discuss with him alternative theories of defense, including second degree murder or "heat of passion."

¶ 15 On cross-examination, defendant acknowledged that trial counsel told him his suppressed statement "would not come in" at his second trial. The following exchange ensued:

> "Q. He told you that if you took the stand though, that statement would then come in to impeach you, correct?
>
> A. I believe he told me that also.
>
> Q. He also told you that your testimony from the first trial could be used to impeach you in your second trial, correct?
>
> A. Yes, I also remember that he told me that.

Q. He told you it was your decision whether or not to testify, correct?

A. Yes, that is what I did not like, because I do not know anything about laws. I do not know.

Q. The judge also told you it's your decision on whether or not to testify, correct?

A. Yes, he told me."

Defendant indicated that he had wanted trial counsel to present his wife, Minerva Sanchez, as a witness. He also stated that his wife had not testified at either of his trials.

¶ 16 On re-direct, posttrial counsel asked defendant the following questions:

"Q. Before telling the judge that you wanted not to testify, did you get any advice from [trial counsel] about whether or not you should testify?

A. No, because when I was in the bullpen, he went there without an interpreter and asked me what I wanted to do, and I told him that the other witness was going to testify, I would, but the previous time, because on the previous time I testified, and she was not allowed to, and the judge did not believe me.

And when he told me that she was not here, then I had to make the decision about not testifying.

Q. And did he give you advice about whether he thought you should or should not testify?

A. No, he told me that it was my decision."

¶ 17 On re-cross, the following exchange occurred:

"Q. And you made the decision not to testify, correct?

A. Yes, because my witness was not present.

THE COURT: And that witness was your wife?

THE WITNESS: Yeah."

¶ 18 Trial counsel then testified regarding his representation of defendant at the second trial. At the time, counsel knew that the appellate court had determined defendant's statement to the police was inadmissible. Counsel testified that he met with defendant in jail nine times and, in addition, spoke with him in the bullpen whenever the case was in court. One of the "major topics" of their conversations was whether defendant would testify at trial. Counsel told defendant the goal of the defense was to have him found not guilty, or, if that failed, have him found guilty of second degree murder. Counsel explained to defendant that for a self-defense theory to be put forward, it would be necessary for him to testify. Counsel stated:

"I explained to him, if he, in fact, testified, the statement which was suppressed, the video statement, could be used to impeach, and that was his fear. His quote to me was, 'That video was the poison in this case,' and he was determined to not have it be shown to the court."

Counsel reiterated that he asked defendant whether he wanted to testify, and defendant answered that he did not. When he explained to defendant that it was his decision whether to testify, defendant "said he was leaving it in God's hands."

¶ 19 On cross-examination, counsel maintained that he had a number of conversations with defendant discussing the importance of him testifying in order to establish self-defense. With regard to defendant's statement to the police, counsel testified as follows:

> "And I explained to him when he was expressing his concern about the video statement coming in, I said, well, we will just do the best we can to explain away any inconsistencies or argue the unreliability of the statement, because in the video statement, he asked for a lawyer, and then there was a short break, and then they continued taking the statement, and that was the basis for [the] statement being suppressed.
>
> So I was telling him one argument that we could present was that the statement was inherently unreliable and should not be relied upon."

Counsel reiterated that whether defendant would testify was "the primary subject" of most of their conversations. Counsel advised defendant to testify so that he could try to establish an affirmative defense, but defendant told him he did not want to testify.

¶ 20 Following argument by the attorneys, the trial court denied the motion for a new trial. Subsequently, the trial court sentenced defendant to 55 years in prison.

¶ 21 On appeal, defendant first contends that his trial counsel provided ineffective assistance by affirmatively misinforming him that if he chose to testify at trial, his suppressed statement would be admissible as substantive evidence against him. Defendant asserts that it was objectively unreasonable for counsel to give him misleading and legally inaccurate advice, and that if he had not been misled into not testifying, there was a reasonable probability that he would have been either acquitted or found guilty of second degree murder. Defendant acknowledges that this specific claim of ineffectiveness was not included in his motion for a new trial, but argues that this court should nevertheless address the issue as plain error or, in the alternative,

find that posttrial counsel was ineffective for not including the claim in the motion for a new trial.

¶ 22 Under the plain error doctrine, this court may consider forfeited errors if (1) the evidence is so closely balanced that the error threatens to tip the scales of justice against the defendant; or (2) the error is so serious that it affects the fairness of the defendant's trial. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). However, before applying the plain error rule, we must first determine whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 23 After a thorough review of the record, we disagree with defendant's assertion that trial counsel misinformed him that the suppressed statement would be admissible as substantive evidence if he chose to testify in his own defense. At the hearing on the motion for a new trial, defendant agreed that trial counsel told him his suppressed statement "would not come in" at his second trial, but that if he took the stand, the statement "would then come in to impeach [him]." Trial counsel testified consistently with defendant, stating, "I explained to him, if he, in fact, testified, the statement which was suppressed, the video statement, could be used to impeach, and that was his fear." These statements affirmatively show that trial counsel correctly informed defendant that if he testified, the State could use the suppressed statement for impeachment purposes. In contrast, no one testified that counsel told defendant the statement could be used as "substantive evidence." Defendant's claim that his counsel misinformed him on this point is contradicted by the record.

¶ 24 In support of his argument that trial counsel affirmatively misrepresented to him that if he testified, he would open the door to the suppressed statement being introduced as substantive evidence, defendant relies exclusively on counsel's statement at the hearing on the motion for a new trial that "I was telling [defendant] one argument that we could present was that the statement was inherently unreliable and should not be relied upon." Defendant argues that this

advice was "grossly erroneous" because (1) as a matter of law, the trier of fact could not rely upon the suppressed statement as evidence of guilt and, (2) the reliability of the statement was irrelevant for purposes of impeachment and would only matter if the statement was introduced as substantive evidence. Thus, as defendant explains in his reply brief, counsel's advice "erroneously gave the impression that the court *could* rely on the confession as substantive evidence."

¶ 25 We fail to see how counsel's advice gave such an impression. Given that both defendant and trial counsel testified that counsel told defendant the suppressed statement could be used for impeachment purposes, we reject defendant's argument that counsel's further statements to defendant gave him the impression the suppressed statement would be admissible as substantive evidence. Defendant's argument fails.

¶ 26 The record contradicts defendant's claim that counsel gave him erroneous advice. There being no error, the plain error doctrine does not apply. See *Thompson*, 238 Ill. 2d at 613. Moreover, because there was no error, posttrial counsel was not ineffective for failing to include this claim in the motion for a new trial. See *People v. Ivy*, 313 Ill. App. 3d 1011, 1018 (2000) (counsel is not required to make futile motions to avoid charges of ineffectiveness).

¶ 27 Defendant's second contention on appeal is that the imposition of the $30 Children's Advocacy Center assessment violated the prohibition against *ex post facto* laws, and the imposition of the $5 Electronic Citation fee was not authorized by statue. The State concedes that these assessments were improperly imposed. We accept the State's concession and accordingly vacate the specified charges. The clerk of the circuit court is ordered to enter a modified fines, fees, and costs order consistent with our decision.

¶ 28 For the reasons explained above, we affirm defendant's conviction and sentence and order the clerk of the circuit court to modify the fines, fees, and costs order.

¶ 29 Affirmed as modified.